Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

MARVIN POLK, WARDEN,
Petitioner,

v.

TIMOTHY LANIER ALLEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI
[Capital Case]

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Capital Case

QUESTIONS PRESENTED

I. **WHETHER THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO GIVE THE MANDATED DEFERENCE TO A STATE COURT DECISION THAT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT.**

II. **WHETHER THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO PROPERLY CONDUCT *BRECHT* HARMLESS ERROR REVIEW.**

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF INTERESTED PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION 2

STATEMENT OF THE CASE 2

I. Procedural History 2

II. Facts Relevant to the Petition 5

REASONS WHY THE WRIT SHOULD ISSUE 8

I. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO GIVE THE MANDATED DEFERENCE TO A STATE COURT DECISION THAT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT.. 8

II. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO PROPERLY CONDUCT *BRECHT* HARMLESS ERROR REVIEW. 13

CONCLUSION 22

APPENDIX:

A. Order of the United States Court of Appeals for the Fourth Circuit, *Allen v. Lee*, 370 F.3d 402 (4th Cir. 2004) 1a

B. Opinion of the en banc United States Court of Appeals for the Fourth Circuit, *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) 29a

C. Order of The Honorable Malcolm J. Howard, United States District Court Judge, Eastern District of North Carolina, dated 19 December 2001 . . . . . 114a

D. Opinion of the North Carolina Supreme Court on remand from the United States Supreme Court, *State v. Allen*, 331 N.C. 746, 417 S.E.2d 227 (1992) 174a

TABLE OF AUTHORITIES

CASES: *Page(s)*

Allen v. Lee, No. CA-97-959-5-H-HC (E.D.N.C., Order filed June 9, 1998) 1

Allen v. Lee, 319 F.3d 645 (4th Cir. 2003) 5

Allen v. Lee, 2003 U.S. App. LEXIS 5760 (4th Cir. 2003) 5

Allen v. Lee, 366 F.3d 319 (4th Cir. 2004) .. 1, 5, 11, 20, 21

Allen v. Lee, 370 F.3d 402 (4th Cir. 2004) ..... 1, 5 ,7, 13-19, 21

Allen v. North Carolina, 494 U.S. 1021 (1990) 3

Allen v. North Carolina, 507 U.S. 967 (1993) 3

Allen v. North Carolina, 507 U.S. 1046 (1993) 3

Allen v. North Carolina, 522 U.S. 846 (1997) 4

Barclay v. Florida, 463 U.S. 939 (1983) 19, 20

Bell v. Cone, 535 U.S. 685 (2002) 8, 9

Brecht v. Abrahamson, 507 U.S. 619 (1993) 14, 21

Chapman v. California, 386 U.S. 18 (1967) 10

Early v. Packer, 537 U.S. 3 (2002) 13

CASES: *Page(s)*

Holland v. Jackson, __U.S. __, __, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) 12

Lindh v. Murphy, 521 U.S. 320 (1997) 8, 9

McKoy v. North Carolina, 494 U.S. 433 (1990) 3, 4, 11, 13, 20

Middleton v. McNeil, 541 U.S. __, 124 S.Ct. 1830 (2004) 11, 12

Mitchell v. Esparza, 540 U.S. 12, 124 S. Ct. 7 (2003) . . . 12

Price v. Vincent, 538 U.S. 634, 123 S.Ct. 1848 (2003) . . 13

State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988) 3

State v. Allen, 331 N.C. 746, 417 S.E.2d 227 (1992) 3, 9

State v. Allen, 345 N.C. 644, 483 S.E.2d 179 (1997) 4

Stringer v. Black, 503 U.S. 222 (1992) 19

Williams v. Taylor, 529 U.S. 362 (2000) 8-10

Woodford v. Visciotti, 537 U.S. 19 (2002) 13

Yarborough v. Gentry, 540 U.S. 1, 157 L. Ed. 2d 1, 124 S. Ct. 1 (2003) 13

OTHER AUTHORITIES: *Page(s)*

28 U.S.C. § 2254(d) 8, 21

28 U.S.C. § 2254(d)(1) 2

N.C. Gen. Stat. § 15A-2000 3

PETITION FOR WRIT OF CERTIORARI

The Office of the Attorney General of North Carolina, on behalf of Marvin Polk,[1] Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Allen v. Lee, 370 F.3d 402 (4th Cir. 2004) (En banc panel's order denying rehearing) (Pet. App. A).

Allen v. Lee, 366 F.3d 319 (4th Cir. 2004) (En banc panel's per curiam opinion reversing and remanding to the district court with instructions to issue a writ of habeas corpus) (Pet. App. B).

Allen v. Lee, No. CA-97-959-5-H-HC (E.D.N.C., Order filed June 9, 1998) (dismissing and denying petition for writ of habeas corpus) (Pet. App. C).

JURISDICTION

The judgment and opinion of the en banc court of appeals were entered on 28 April 2004. (Pet. App. 29a). The Fourth Circuit denied the State's Petition for 2nd Rehearing En Banc on 4 June 2004. (Pet. App. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Mr. Marvin Polk replaced R.C. Lee as warden of Central Prison on 1 August 2003.

STATUTORY PROVISION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

I. Procedural History

Almost twenty years ago, in the midst of an interstate crime spree, Allen murdered Trooper Raymond E. Worley while Trooper Worley was performing his duties as a member of the North Carolina State Highway Patrol. After he murdered Trooper Worley, Allen and his companions, Mack Green, Antonio Worrell, and Alex Allen fled. Law enforcement apprehended Allen and his companions. Shortly thereafter, Allen confessed to law enforcement that he killed Trooper Worley. Two days later Allen confessed to one of his attorneys that he murdered Trooper Worley.

On 20 May 1985, Allen was indicted for the first degree murder of Trooper Worley and for three counts of possessing stolen goods. Allen was tried at the 27 November 1985

Criminal Session of the Superior Court of Halifax County, the Honorable Mary M. Pope, Judge Presiding.

The jury returned verdicts of guilty of first degree murder by premeditation and deliberation and of three counts of felonious possession of stolen goods. Pursuant to a sentencing hearing held on the first degree murder conviction under N.C. Gen. Stat. § 15A-2000, the jury recommended the death sentence for Allen.

Allen appealed his conviction and sentence to the North Carolina Supreme Court. In *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), the North Carolina Supreme Court affirmed Allen's verdict and death sentence on 6 October 1988.

Allen subsequently filed a Petition for Writ of Certiorari in this Court. On 19 March 1990, this Court granted certiorari, vacated the judgment and remanded for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433 (1990). *Allen v. North Carolina*, 494 U.S. 1021 (1990).

On 25 June 1992, the Supreme Court of North Carolina held that, while there was *McKoy* error in the jury charge, the error was harmless beyond a reasonable doubt and the court reinstated Allen's death sentence. *State v. Allen*, 331 N.C. 746, 417 S.E.2d 227 (1992) (Pet. App. 174a).

On 1 March 1993, this Court refused to review the decision of the North Carolina Supreme Court. *Allen v. North Carolina*, 507 U.S. 967 (1993), and subsequently denied Allen's Petition for Rehearing. *Allen v. North Carolina*, 507 U.S. 1046 (1993).

On 1 June 1994, Allen filed a Motion for Appropriate Relief in the Superior Court of Halifax County, raising

challenges to his conviction and sentence of death, including several claims of ineffective assistance of counsel.

By an Order dated 6 April 1995, the state post-conviction court granted summary judgment to the State as to several of Allen's claims included in his Motion for Appropriate Relief. In particular, Claim III, the claim that the McKoy error in Allen's trial was not rendered harmless by the post-deliberation poll, and Claim IV, the claims that Allen's constitutional rights were violated by his exclusion from an *ex parte voir dire* of a juror were procedurally barred. Because of the procedural bar, Judge Lamm also struck affidavits that Allen had filed in support of the *McKoy* claim.

After several hearings and multiple amendments to Allen's MAR the Superior Court of Halifax County denied Allen's Motion for Appropriate Relief by Order dated 23 August 1996. The trial court also heard brief argument on the Motion for Discovery and then denied Allen's discovery motion. On 16 December 1996, Allen petitioned the Supreme Court of North Carolina for a writ of certiorari. The Supreme Court of North Carolina issued an Order denying the petition on 11 February 1997. *State v. Allen*, 345 N.C. 644, 483 S.E.2d 179 (1997).

On 11 June 1997, Allen filed a Petition for Writ of Certiorari in the United States Supreme Court. On 6 October 1997, the United States Supreme Court denied review. *Allen v. North Carolina*, 522 U.S. 846 (1997).

Allen filed a Petition for a Writ of Habeas Corpus on 9 February 1998. The State filed an Answer and Motion for Summary Judgment on 9 April 1998. Allen filed an amendment on 1 December 1998 and the State filed an Answer and Motion for Summary Judgment on the amendment on 23 February 1999.

On 30 November 1998, Allen filed a second Motion for Appropriate Relief in the Superior Court of Halifax County. In its Order of 31 March 2000 the Superior Court of Halifax County found that the claims in the defendant's second Motion for Appropriate Relief (MAR2) were without merit and were procedurally barred. The claims contained in Allen's MAR2 are the same claims contained in his amendment to his habeas petition filed 1 December 1998.

On 19 December 2001, the District Court entered an Order granting the State's motion for summary judgment and denying Allen's petition for writ of habeas corpus. On 27 February 2002 the District Court entered an Order denying Allen's Motion to Alter or Amend Judgment. On 29 March 2002 Allen filed a Notice of Appeal in District Court. The District Court granted a certificate of appealability on 19 April 2002.

A three judge panel of the Fourth Circuit vacated and remanded the case in a split opinion. *Allen v. Lee*, 319 F.3d 645 (4th Cir. 2003) The State's motion for rehearing and rehearing en banc was granted and the panel opinion was vacated. *Allen v. Lee*, 2003 U.S. App. LEXIS 5760 (4th Cir. 2003)

At rehearing, the en banc Fourth Circuit issued a per curiam opinion reversing and remanding to the district court with instructions to issue a writ of habeas corpus. *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) (Pet. App. 29a). The State's motion for a second rehearing was denied. *Allen v. Lee*, 370 F.3d 402 (4th Cir. 2004) (Pet. App. 1a).

II. Facts Relevant to the Petition

Shortly after murdering Trooper Worley on 14 May 1985, Allen confessed to law enforcement. Two days later Allen also

confessed to one of his attorneys that he murdered Trooper Worley.[2]

In his confession to law enforcement, Allen said that on 11 May 1985, he left Washington, D.C. with Alex Allen, Antonio Worrell, and Mark Greene. Allen stated that Antonio Worrell was driving a van stolen from Maryland and that he, Alex Allen, and Worrell were there when the van was stolen. After they stole the van, they went to Wallace, North Carolina, to see a girlfriend of Worrell's. At around midnight on 13 May 1985, Allen and the other suspects were returning to Washington, D.C. On the way, they broke into a store by going in through a wall in the restroom. Allen and the other suspects took beer, cigarettes, a .22 pistol and a .38 pistol. Allen kept the .38 caliber pistol, and Worrell kept the .22. After breaking into the store, Allen and the other suspects headed for home. Worrell hot-wired a white van and took it from a car lot. He and Greene drove that van while Allen and his brother Alex drove the van that had been stolen in Maryland.

Allen and his brother traveled in the back van while Worrell and Greene traveled in the front van. A patrol car turned on its blue light while going around Allen's van. The car stopped Worrell. Allen pulled his van over behind Trooper Worley and stopped. Trooper Worley told Allen to get out of his van and come to his car. When he opened the patrol car door to get in, Allen had his pistol in his belt. When Trooper Worley reached over to open the car door for him to get in, Allen pulled his gun and fired twice at Trooper Worley. Then he ran back to his van and got in.

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[2] Although unknown to the State at trial, Allen also confessed to one of his trial attorneys, Steve Graham on 16 May 1985, two days after his confession to law enforcement. The second confession was consistent with the confession given to the police two days earlier.

At that point, Allen drove the van away with Worrell, Greene, and Alex with him. Allen drove down a long road, through a field, into some woods and parked the van. Allen and the others began to run. They ran until the officers caught them.

In his dissent to the denial of rehearing, Judge Luttig summed up the facts of this murder:

> On May 11, 1985, in the midst of an interstate crime spree, Allen pulled up behind the patrol car of North Carolina State Highway Trooper Raymond E. Worley in a stolen van. Trooper Worley had, only moments earlier, stopped a different stolen van -- a vehicle that Allen himself had helped to hot-wire and steal -- driven by Antonio Worrell, one of Allen's partners in the crime spree. After escorting Worrell into his patrol car, Worley motioned for Allen to exit from the stolen van that he was driving and approach the patrol car, which Allen did. Unbeknownst to Trooper Worley, however, Allen was armed, and, when Trooper Worley reached to unlock the patrol car door for him, Allen fired three shots at Worley at point blank range, once through the head. Allen and Worrell then left Worley on the side of the highway, slumped over in the patrol car. Literally drowning to death in his own blood, Worley died some four minutes later, leaving his wife without a husband and his two children without a father.

Allen v. Lee, 370 F.3d 402, 408 (4th Cir. 2004) (Luttig, J., dissenting) (Pet. App. 12a).

REASONS WHY THE WRIT SHOULD ISSUE

I. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO GIVE THE MANDATED DEFERENCE TO A STATE COURT DECISION THAT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF UNITED STATES SUPREME COURT PRECEDENT.

Allen's federal habeas corpus petition, filed after April 24, 1996, is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336-38 (1997). AEDPA substantially changed the role of the federal judiciary in reviewing habeas petitions, in particular, limiting the authority to grant the writ, even where the federal court concludes in its independent judgment that the decision of the state court was incorrect. *Bell v. Cone*, 535 U.S. 685, 693 (2002). As this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), a federal court's inquiry is limited under AEDPA to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

The standard for granting habeas relief with respect to claims that have been previously adjudicated on the merits in state court is a narrow one set forth in 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This Court has instructed that a state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that is different from the governing law set forth in Supreme Court decisions, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. A federal court may grant habeas relief under the "unreasonable application" clause if the state court correctly identifies the governing principal, but unreasonably applies it to the facts of the particular case. *Bell*, 535 U.S. at 694; *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Because AEDPA's "new, highly deferential standard for evaluating state court rulings" is designed to "ensure that state-court convictions are given effect to the extent possible under law," a state court's ruling must be viewed in terms of its "objective reasonableness." *Bell*, 535 U.S. at 693; *Williams*, 529 U.S. at 403-04; *Lindh*, 521 U.S. at 333 n.7.

The North Carolina Supreme Court, on remand from this Court, held that the *McKoy* error at Allen's trial was harmless beyond a reasonable doubt. The North Carolina Supreme Court based this finding on a post-sentence jury poll where each juror was instructed by the clerk that they would be "asked individually as to your answers to the issues and as to the recommendation". *State v. Allen*, 331 N.C. 746, 747, 417 S.E.2d 227, 228 (1992) (Pet. App. 174a-175a).

Because the North Carolina Supreme Court correctly identified the relevant standard from this Court's decision in *Chapman v. California*, 386 U.S. 18, 24 (1967), the issue before the Fourth Circuit was whether the North Carolina Supreme Court's conclusion that the *McKoy* error was harmless beyond a reasonable doubt was an unreasonable application of *Chapman*. In a per curiam opinion a majority of the Fourth Circuit held it was an unreasonable application. The Fourth Circuit decision was contrary to the standard of review required under 28 U.S.C. § 2254(d)(1) and this Court's decision in *Williams v. Taylor,* 529 U.S. 362 (2000).

The jury poll process was described by Fourth Circuit Judge Niemeyer in his dissent below.

> After the jury returned its verdict and the clerk read it in open court, the trial judge conducted a poll instructing the jury as follows:
>
> > Members of the jury, at this time I am going to ask that Madam Clerk, when she is ready, poll each of you. This is the same procedure that we used on Monday. *You will be asked individually* as to your answers to the issues and as to the recommendation.
>
> (Emphasis added). Each individual juror was then polled on the verdict form, including the answers to each of the mitigating circumstances, and asked, "Are these the answers to your issues" and "And do *you* still

> assent thereto?" (Emphasis added). In each case, the juror said "yes." Then each individual juror was asked whether the recommendation of the death penalty was "still *your* recommendation" (emphasis added) and whether the individual juror "still assented thereto." Again, in each case, the juror responded that this was his or her individual recommendation. Because each juror *individually* indicated that the vote on the ten mitigating factors was also his or her individual vote, the verdict on the mitigating factors was in fact unanimous, and the *McKoy* error did not deny any juror the opportunity to consider his or her individual finding of a mitigating circumstance.

Allen v. Lee, 366 F.3d 319, 352 (4th Cir. 2004) (Pet. App. 91a) (Niemeyer, J., dissenting) (emphasis in original).

The North Carolina Supreme Court understood this Court's holding in *McKoy* and acknowledged that *McKoy* error existed in Allen's case. The North Carolina Supreme Court then determined that the jury poll rendered the McKoy error harmless beyond a reasonable doubt.

In *Middleton v. McNeil*, 541 U.S. __, 124 S.Ct. 1830 (2004), this Court stated:

> A federal court may grant habeas relief to a state prisoner if a state court's adjudication of his constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

> § 2254(d)(1). "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Yarborough v. Gentry*, 540 U.S. 1, ___, 157 L. Ed. 2d 1, 124 S. Ct. 1 (2003) (slip op., at 4-5) (per curiam); *see Williams v. Taylor*, 529 U.S. 362, 409, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)

Id. at ___, 124 S.Ct. at 1832.

In *McNeil*, as in the present case, the jury instructions contained error. The California Supreme Court held that, in spite of the erroneous instruction, there was no reasonable likelihood the jury was misled and affirmed that defendant's conviction. The District Court denied that defendant's habeas petition and the Ninth Circuit reversed. This Court then reversed the Ninth Circuit opinion. Like the Ninth Circuit in *McNeil*, the per curiam opinion of the Fourth Circuit in the present case "failed to give appropriate deference to the state court's decision." *Id.* at ___, 124 S.Ct. at 1832.

The Fourth Circuit's decision to grant federal habeas relief in this case, in the face of the state court's well-reasoned determination to the contrary, is similar to other instances of overreaching by some federal courts in the context of federal habeas challenges to state-court criminal convictions. *See, e.g., McNeil*, 541 U.S. ___, 124 S. Ct. 1830; *Holland v. Jackson*, __U.S. __, __, 124 S. Ct. 2736, __, 159 L. Ed. 2d 683, 689 (2004); (State-court decisions are to be given "the benefit of the doubt"); *Mitchell v. Esparza*, 540 U.S. 12, __, 124 S. Ct. 7, 9 (2003) (*per curiam*) (Sixth Circuit decision "ignores the limits imposed on federal habeas review by 28 U.S.C. §2254(d)" and "failed to cite, much less apply, this section"); *Yarborough v.*

Gentry, 540 U.S. 1, __, 124 S. Ct. 1, 7 (2003) ("Ninth Circuit's conclusion . . . gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials"); *Price v. Vincent*, 538 U.S. 634, 123 S.Ct. 1848, 1852 (2003) ("Although the [Sixth Circuit] Court of Appeals recited [the AEDPA standard], it proceeded to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (*per curiam*) (Ninth Circuit's grant of habeas relief "exceeds the limits imposed on federal habeas review by 28 U.S.C. §2254(d)"); *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (same).

The majority opinion below on the *McKoy* issue, like the circuit opinions listed above, exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d) and conflicts with this Court's relevant decisions. Certiorari is warranted under Supreme Court Rule 10(c).

II. THE FOURTH CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY TO GRANT THE WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(d) BY FAILING TO PROPERLY CONDUCT *BRECHT* HARMLESS ERROR REVIEW

Of the ten mitigating factors submitted by the trial court to the jury, three factors were found unanimously by the jury: (1) Allen had no history of use of deadly weapons, (2) Allen expressed remorse for killing Trooper Worley and (3) Allen completed his GED high school equivalency. *Allen v. Lee*, 370 F.3d 402, 408 (4th Cir. 2004) (Pet. App. 13a). The two aggravating factors found by the jury were (1) Trooper Worley was murdered while engaged in his official duties and (2) Allen

killed Trooper Worley to avoid arrest. *Id.* at 409 (4th Cir. 2004) (Pet. App. 14a).

The jury did not find unanimously the remaining submitted factors: (1) Allen had no significant history of criminal activity, (2) Allen being 'only' thirty years old at the time he killed Trooper Worley, (3) Allen was raised in a single parent home, (4) Allen is the father of three sons, (5) Allen remained employed when not incarcerated, (6) Allen supported one of his children and (7) any other circumstance arising from the evidence. *Id.* at 403 (4th Cir. 2004) (Pet. App. 2a).

Based upon the *McKoy* error and the mitigating factors submitted to the jury, the per curiam by a majority of the Fourth Circuit held that the *McKoy* error at Allen's sentencing phase was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). This holding is in conflict with this Court's opinions and should be reversed.

To obtain habeas relief based on trial error, a habeas petitioner must establish that "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In *Brecht* this Court concluded

> "Our inquiry here is whether, in light of the record as a whole, the State's improper use for impeachment purposes of petitioner's post-*Miranda* silence, see n. 2, *supra*, "had substantial and injurious effect or influence in determining the jury's verdict." We think it clear that it did not.

Id. at 638.

In the present case a review of the whole record, including the aggravating factors surrounding Allen's murder of Trooper Worley and the mitigating factors submitted but not found unanimously by the jury, it is clear there was no "substantial and injurious effect" on the jury's verdict by the *McKoy* error.

The mitigating factors excluded from the jury's consideration due to the *McKoy* error were of exceedingly little value, assuming that they possessed any value at all. None of these factors would have influenced a reasonable juror to spare Allen's life given the crime he committed and aggravating factors before the jury.

Judge Luttig's describes, in great detail, each of these mitigating factors rejected by the jury, as well as the evidence presented at trial of each factor, in his dissent to the denial of rehearing.

As to the first rejected mitigator, "Allen had no significant history of criminal activity" Judge Luttig states that:

> Allen's criminal history record is not one that would prompt thought of mitigation. The record discloses that Allen had multiple prior convictions, for shoplifting, breaking and entering, and two counts of second degree burglary.

Allen v. Lee, 370 F.3d 402, 411 (4th Cir. 2004) (Luttig, J., dissenting) (Pet. App. 17a).

As to the second rejected mitigator, "age":

> Neither would the second mitigating factor, Allen's age, lead any juror to vote for a life sentence for

> Allen. Indeed, at the time of the murder, Allen was neither juvenile, nor elderly; rather, born to Petersburg, Virginia parents in 1955, Allen was, as noted, *thirty years old* at the time that he murdered Trooper Worley. It would, of course, be entirely irrational for a juror to consider this fact one in mitigation of the brutal murder of a state trooper while he was engaged in the discharge of his official duties.

Id. at 411 (Luttig, J., dissenting) (Pet. App. 17a).

As to the third rejected mitigator, "Allen was raised in a single parent home":

> As to this mitigating factor, the plurality relates that Allen "only" saw his father three or four times a year after his parents divorced and until Allen entered sixth grade. Slip Op. at 44. The plurality omits to mention, however, that, although Allen's parents had divorced when Allen was three, Allen's father remained financially supportive and in close contact with his children after the divorce. R. 3130-31. In fact, Allen's mother testified, and the jurors in the sentencing proceeding heard, that after Allen's mother moved with her children from Petersburg, Virginia, to Washington, D.C. (where Allen's father had relocated after the divorce) shortly before the start of Allen's sixth-grade year, Allen's father "was over to the house each and every other day to see the children and to see that they was minding, that they were in school, and were they getting their lessons, and if anything went wrong, he always chastised them." R. 3131. And, when Allen came of age to work, his father gave Allen and his first wife a job at the grocery store that Allen's father had established and owned. R. 3075. Thus, although the plurality would like to leave one

> with the impression that Allen did not have a strong male role model, such is anything but the case.
>
> Additionally, Allen's mother testified that Allen had received a church education and had "plenty" while growing up. R. 3143-44. And as for the difficulties of "single-parent rearing," Allen's mother further stated that she did not raise her children alone; the children's grandmother lived with them at all times, and looked after them when Allen's mother was at work. R. 3127, 3129. The plurality mentions none of this obviously relevant evidence, even as it claims that "any one" of the five factors it deems "colorable" -- necessarily including Allen's "single-parent rearing" -- could have led a juror to vote for a life sentence.
>
> In light of all of this evidence, and Allen's admission that he had suffered no physical abuse or neglect from his parents while growing up, R. 3087, it is unsurprising that the jury did not unanimously vote to consider Allen's rearing in a single-parent home to be a mitigating factor. It would have been affirmatively surprising for *any* juror to find that Allen's rearing should be accorded any mitigating weight at all in light of the specific crime that Allen had committed.

Id. at 411-412 (Luttig, J., dissenting) (Pet. App. 17a-18a).

As to the fourth and sixth rejected mitigators, that "Allen is the father of three sons" and that "Timothy Lanier Allen was a supporting parent of at least one of his children.":

> While it is true as a factual matter that Allen fathered three sons, Allen lived with exactly none of his offspring. And in the very mitigating factor submitted to the jury, he only claimed before the court to be a supporting parent of one of them. The juxtaposition of

> these two mitigating factors -- that Allen had three sons, but supported only one of them -- would more likely have evoked distaste than sympathy.

Id. at 412 (Luttig, J., dissenting) (Pet. App. 18a-19a).

As to the fifth rejected mitigator, "Timothy Lanier Allen remained employed during the times he was not incarcerated":

> Obviously this provides an exceedingly uncomfortable basis for mitigation. The very statement of this factor is an unsettling reminder to the jury that there were other periods in Allen's life during which he was doing time in prison for other crimes, precisely the kind of evidence that would, if anything, reinforce the jury's considered sentencing conclusion.

Id. at 412 (Luttig, J., dissenting) (Pet. App. 19a).

The final rejected mitigator was "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value". There was little evidence to support a reasonable "catch-all" mitigating factor such that a reasonable juror would have been guided to reject the death penalty.

> None of this evidence would have remotely influenced a reasonable juror to spare Allen's life. It denigrates the seriousness of Allen's offense for the majority even to intimate that, for example, a juror would have found that a fight that occurred between Allen's parents at Allen's *third* birthday party, twenty-seven years before he murdered Trooper Worley, or that Allen was "shy" would be relevant to Allen's culpability in taking the life of Raymond Worley,

> much less sufficiently dispositive to warrant a life sentence. Obviously, Allen's does not even begin to approach the type of "nightmarish" childhood that might have led a juror to believe Allen had no option but to lead a life of violence and self-destruction that ultimately culminated in the murder of which Allen was convicted. *Williams v. Taylor, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).* It bears repeating that Allen testified that he had suffered no physical abuse or neglect at his parents' hands, and that his parents got along most of the time when they were together.

Id. at 413 (Luttig, J., dissenting) (footnotes omitted) (Pet. App. 20a-21a).

To find that the erroneous jury instruction had a "substantial and injurious effect or influence on the jury's verdict" sentencing a defendant to death, "the court must determine what the sentencer would have done absent" the error. *Stringer v. Black,* 503 U.S. 222, 230-31 (1992). Nothing in the above mitigating factors, and the evidence in support thereof, could remotely be termed as having an "substantial" effect.

In *Barclay v. Florida, 463 U.S. 939 (1983),* this Court reviewed a capital case where the trial court had improperly considered an aggravating circumstance and on appeal the state appellate court held the error harmless given the facts of the case. This Court stated:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating

> circumstances could not possibly affect the balance. See n. 9, *supra*. "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."

Id. at 958 (emphasis in original).

In the present case comparing the aggravating and mitigating evidence which the jury did consider to the particular evidence which the jury was prevented by the faulty jury instruction from considering (mitigating factors of exceedingly low value), it is clear the error was harmless and had no "substantial and injurious effect" on the jury's verdict.

The conclusion that the *McKoy* error did not have a "substantial and injurious effect" on the jury's penalty phase verdict is supported by the jury poll where the jurors were told *"[y]ou will be asked individually* as to your answers to the issues and as to the recommendation". All the jurors responded individually that was their vote. This is logical, given the questionable value of the mitigating factors that were rejected by the jury. Additionally, the trial instructed the jury prior to the poll:

> Members of the jury, at this time I am going to ask that Madam Clerk, when she is ready, poll each of you. **This is the same procedure that we used on Monday**. You will be asked individually as to your answers to the issues and as to the recommendation

Allen v. Lee, 366 F.3d at 352 (Pet. App. 91a) (Niemeyer, J., dissenting) (emphasis added).

Therefore the trial judge told the jury that the poll was the same as the poll conducted after the guilty verdict, where each

was individually asked as to their own answers. This further demonstrated to the jury that what the poll sought was their answers as individuals and not reaffirmation of the jury's collective response. Clearly there was no "substantial and injurious effect" on the jury's verdict.

Judge Williams, in her dissent, held that the Fourth Circuit en banc opinion was in conflict with this Court's opinion in *Brecht*. *Allen v. Lee*, 366 F.3d 319, 354 (4th Cir. 2004) (Williams, J., dissenting) (Pet. App. 95a-96a). Judge Luttig also held in his dissent to the Fourth Circuit's denial of the State's Second Motion for Rehearing that the en banc opinion was in conflict with this Court's opinion in *Brecht*. *Allen v. Lee*, 370 F.3d 402, 417 (4th Cir. 2004) (Luttig, J., dissenting) ("An opinion that flouts more conspicuously the Supreme Court's decision in *Brecht* v. *Abrahamson* one would be hard-pressed to imagine.") (Pet. App. 28a).

On 14 May 1985, Allen murdered Trooper Raymond E. Worley while Trooper Worley was performing his duties as a member of the North Carolina State Highway Patrol. After he murdered Trooper Worley, Allen ran until he was apprehended by law enforcement. Now over nineteen years later, the Fourt Circuit has overturned the sentence issued by the people of North Carolina without providing a detailed explanation this Court requires under *Brecht*. The factors that were rejected by the jury under the faulty instructions were of minimal value. The Fourth Circuit majority opinion failed to give a reasoned weighing of mitigating factors and aggravating circumstances as is required by *Brecht*. The majority opinion exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d) and conflicts with this Court's relevant decisions. Certiorari is warranted under Supreme Court Rule 10(c).

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to summarily reverse the Fourth Circuit panel's *per curiam* opinion or, in the alternative, to review the decision of the Fourth Circuit.

Respectfully submitted,

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